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In the Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF REED SMITH LLP, GRAYBAR ELECTRIC COMPANY, INC., AND U.S. STEEL CORPORATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE

Reed Smith LLP is a limited liability partnership. Reed Smith has no parent corporation and it does not issue stock.

Graybar Electric Company, Inc. is an employee-owned company that does not issue publicly-held stock. It has no parent corporation.

U.S. Steel Corporation has no parent corporation. No publicly-traded company owns 10% or more of its stock.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Reed Smith LLP is one of the fifteen largest law firms in the world, with nearly 1,500 lawyers in twenty-three cities. Reed Smith represents clients in a wide range of corporate and litigation matters.

Graybar Electric Company, Inc., an employee-owned company based in St. Louis, Missouri, is a leading North American distributor of electrical, telecommunications, and networking products.

U.S. Steel Corporation, headquartered in Pittsburgh, Pennsylvania, is an integrated steel producer with major production operations in the United States, Canada and Central Europe with an annual raw steelmaking capability of 31.7 million net tons. U.S. Steel manufactures a wide range of value-added steel sheet and tubular products for the

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[1] As required by Supreme Court Rule 37.2(a), the undersigned counsel for amici certifies that counsel of record for all parties received timely notice of the amici's intention to file a brief in support of the Petitioner at least ten days prior to the due date for the amici curiae brief. Letters reflecting the parties' consent to the filing of this brief are being lodged with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for the amici states that no counsel for a party authored this brief in whole or in part. No person other than amicus Reed Smith LLP made a monetary contribution to the preparation or submission of this brief.

automotive, appliance, container, industrial machinery, construction, and oil and gas industries.

Graybar and U.S. Steel support the longstanding public policy favoring broad access to the advice and opinions of legal counsel, and are concerned that the First Circuit's *en banc* decision in *Textron*, if not reversed by this Court, will seriously undermine this fundamental privilege.

Amici have read the relevant pleadings related to the Petition for Certiorari, as well as the briefs and opinions in the courts below. They also have reviewed the list of amici in this Court. Amici believe that the perspective they offer the Court is particularly relevant, coming as it does from companies that frequently engage counsel to provide written legal advice on matters where litigation is anticipated, but not yet filed. For its part, Reed Smith regularly advises companies in these circumstances and shares its clients' concerns about the First Circuit's troubling application of the work product privilege.

The descriptions in this brief of situations in which written legal opinions are given by in-house or retained counsel, and the difficulties associated with seeking and providing those opinions when (as now) they are not uniformly protected, come from amici's own experience. This brief is submitted to highlight the concreteness and immediacy of the legal issues the Petition raises.

ARGUMENT

The opinion below deepened the already significant split among the Circuits regarding the scope of the work product privilege. This split threatens the traditional protections afforded by this privilege and creates uncertainty for all companies that rely upon their counsel for candid written opinions regarding the risks of potential litigation. The implications of this case extend beyond the discoverability of tax accrual workpapers, as critically important as that narrow issue is for corporate America. The First Circuit's *en banc* decision potentially vitiates work product protection in a wide range of common litigator-to-client communications and threatens to impair companies' abilities to obtain frank evaluations of all types of litigation risks from both in-house and retained counsel.

The First Circuit's holding, if allowed to stand, will severely and adversely affect the way companies seek and lawyers provide advice, and will change fundamentally certain important dynamics in civil litigation. The First Circuit's approach materially raises the stakes when a court issues an adverse privilege ruling because such rulings are now not immediately appealable under the collateral order doctrine. Perhaps most importantly, the First Circuit's significant narrowing of the work product privilege can be a game-changer in civil litigation. A lawyer's most sensitive work product–often a

roadmap for litigation victory or negotiation dominance when placed into an adversary's hands–is now likely to be unprotected from the client's adversaries whenever it is divulged to a company's auditors or other friendly parties.

Corporate America and the lawyers who serve it need a pronouncement from this Court of a single, workable statement of the scope of the work product privilege, particularly as it pertains to the application of the privilege when litigation is anticipated but not yet pending. More specifically, we need this Court to restore the historic protections afforded to the mental impressions of the attorneys whose candid advice corporations should be able to obtain without fear of disclosure to an adversary.

A. The Court should hear the case because the Circuit split causes intolerable uncertainty for all companies that count on their lawyers to provide them with candid written evaluations of litigation risks well in advance of litigation.

Amici are two Fortune 500 companies and a worldwide law firm that represents clients in all types of litigation and counsels them on litigation risks. In situations where they anticipate that litigation will ensue, amici and their lawyers, including firms like Reed Smith, routinely exchange thoughts, impressions, and opinions on the viability of legal positions and the range of possible outcomes.

Corporations, like amici, regularly have these communications with their in-house counsel as well.

The First Circuit's construction and application of Federal Rule of Civil Procedure 26(b)(3) has effectively redrafted the Rule by reading "anticipation of litigation" to mean "anticipation of using at trial" when it comes to documents setting forth a lawyer's mental impressions and legal analyses. That unwarranted editing–which violates settled principles of statutory construction–robs Rule 26(b)(3) of much of its protective force. For clients and the lawyers who advise them, the result is a legal minefield, bordered by uncertainty, where their most confidential legal advice must be disclosed freely to adversaries–here, a taxing agency.

The novel rule announced below has widespread implications, especially since there often is considerable uncertainty as to which law will apply or what considerations will influence the privilege law controlling in federal civil litigation. *Cf.* J. Corr, *Attorney-Client Privilege in the United States* § 12.4 (2d ed. 2009) (describing how the "choice of law analysis tends to become particularly uncertain" when evaluating which law of privilege applies); *see also id.* § 12.22.

Plainly, this is no area for mixed messages or palpable inconsistency. Lawyers and clients alike need to know *ex ante*–and well before litigation actually is filed or a trial commences–that

documents conveying lawyers' mental impressions and legal opinions prepared in anticipation of litigation will be protected by the work product doctrine. The First Circuit's holding and rationale fail that essential purpose and thereby undermine the certainty Rule 26(b)(3) is intended to promote. This Court's intervention accordingly is needed to resolve this Circuit conflict and put the work product privilege back on its proper footing.

1. The *Textron* rule vitiates the attorney work product privilege in a wide variety of business transactions in which it may be the only privilege that will keep an attorney's mental impressions out of adversaries' hands.

Although the First Circuit purported to be solicitous of the mental impressions of trial lawyers, the court's holding actually vitiates the work product privilege for a wide range of common litigator–to–client communications, and impairs companies' willingness and ability to obtain effective, candid evaluations of their litigation risks in a wide range of circumstances. The attorney-client privilege is one of the principal means for protecting from disclosure communications in which legal advice is shared. When it comes to the legal opinions or positions themselves, however, the confidentiality afforded by the attorney–client privilege is buttressed by the

additional protections afforded by the work product doctrine.

Indeed, the work product privilege often is the only available protection against the compelled disclosure of lawyers' mental impressions and other written work product to the client's adversaries. This is because the standards for when a company waives the protection of the attorney-client privilege are more easily met than the standards governing waiver of the work product privilege (which is waived only if the client disclosed it in a way "inconsistent with keeping it from an adversary"). *E.g., United States v. Mass. Inst. Of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). Clients thus may waive the attorney-client privilege in order to advance legitimate business interests (*e.g.*, by sharing the advice of in-house or retained counsel with third parties such as auditors, prospective merger partners, and the like).[2]

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[2] *See In re Juniper Networks, Inc. Securities Litig.*, Nos. 06-4327 & 08-00246, 2009 WL 4644534 (N.D. Cal. Dec. 9, 2009) (audit committee's disclosure of contents of interview to outside auditors waived attorney-client privilege); *Nidec Corp. v. Victor Co. Of Japan*, 249 F.R.D. 575 (N.D. Cal. 2007) (corporation's disclosure of "litigation abstract" evaluating possible litigation to a potential bidder for its shares waived attorney-client privilege over that abstract); *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342 (N.D. Ohio 1999) (disclosure of legal advice to potential business partner regarding a transaction waived attorney-client privilege); *SCM Corp. v. Xerox Corp.*, 70 F.R.D.

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Historically, however, they could take comfort in the knowledge that the work product privilege nevertheless protected their lawyers' most sensitive opinions from compelled disclosure to their adversaries.[3]

The First Circuit's opinion has profoundly changed that legal landscape. Its holding may well foreclose the application of the work product doctrine in many situations where it serves its paramount purpose. The unavailability of the work product privilege will, in turn, compromise the attorney-client relationship and limit clients' access to candid written opinions from their lawyers.

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508 (D. Conn. 1976) (discussions between joint venturers relating to one party's effort to relinquish control of the venture to the other waived attorney-client privilege).

[3] *See SEC v. Roberts*, 254 F.R.D. 371 (N.D. Cal. 2008) (work product privilege protected lawyers' mental impressions of interview of former employees from compelled disclosure to adversaries, despite disclosure to the company's outside auditor); *Int'l Design Concepts, Inc. v. Saks Inc.*, No. 05-4754, 2006 WL 1564684 (S.D.N.Y. June 6, 2006) (work product privilege protected lawyers' memoranda summarizing interviews regarding potential litigation, despite disclosure to outside auditor); *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 229 F.R.D. 441 (S.D.N.Y. 2004) (work product privilege protected a law firm's reports following an internal investigation of theft by client's employee, despite client's disclosure of reports to its outside auditor).

There are many situations in which clients need legal advice regarding potential litigation exposures, and need to share that advice with aligned parties, but in which the lawyer does *not* intend to use his or her risk assessment at a future trial. For example:

- Companies that make public filings with the Securities and Exchange Commission must divulge their lawyers' litigation risk assessments to their accounting firm in connection with the accountant's attestation as to the adequacy of financial statement reserves for uncertain tax and other legal exposures. Indeed, in the wake of corporate accounting scandals, auditors are asking their corporate clients for a broader range of documents, including privileged documents, than ever before in this country's history.[4]

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[4] For example, in 2003, the American Institute of Certified Public Accountants ("AICPA") amended its interpretation of auditing standard AU § 9326 (addressing an auditor's duty to obtain evidence on income tax accruals) to provide that "the auditor should obtain access to the opinion, notwithstanding potential concerns regarding attorney-client or other forms of privilege." AU § 9326, *Evidential Matter: Auditing Interpretations of Section 326*, ¶ 2.22 (AICPA 2003), available at http://www.pcaobus.org/standards/interim_standards/auditing_

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- Corporations' in-house and outside lawyers often respond to auditors' inquiries about threatened litigation and its potential impact on the corporation's financial statements.

- Publicly traded companies and other public filing companies must establish reserves on their financial statements for uncertain tax positions, and frequently must obtain the advice of counsel in that regard. They need to disclose that legal advice to their public accounting firm in the attestation process regarding the percentage likelihood that the company will prevail in litigation regarding that exposure if challenged by federal or state taxing authorities.

- In-house or retained counsel may advise on the risk of potential future litigation when a company is designing, developing, and introducing a new product into the marketplace. The client may need to share those

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standards/au_9326.html). If the corporation balks at permitting the auditor to examine the documents, he or she "should assess the importance of the client-imposed scope limitation on his or her ability to form an opinion." *Id.*, ¶ 2.09.

assessments with consultants, public relations firms, or other closely aligned parties.

- A company may be obliged to share, or may have business reasons to share, its counsel's evaluation of litigation risks with a potential merger candidate, financier, or investor.

- Companies seek and receive legal advice regarding potential liabilities upon receiving a request for information from a government agency that may or may not lead to litigation with the agency. The company may have *bona fide* business reasons to share that legal advice with its auditors and consultants.

- In-house and retained counsel also often make written assessments of their clients' legal risks in a wide variety of circumstances with an eye toward *avoiding* litigation through settlement.

Indeed, as the dissent below pointed out, "[n]early every major business decision by a public company has a legal dimension that will require [litigation] analysis. Corporate attorneys preparing such analyses should now be aware that their work

product is not protected in this circuit." Pet. App., 34a.

The work product privilege, however, plays just as important a role in any of these fact patterns as it does for advice provided on the eve of trial. Access to lawyers' candid and contemplative legal advice in these circumstances facilitates strategic decision making directly related to potential litigation. The work product privilege is intended to afford clients the opportunity to obtain that advice without fear that it will be disclosed to an adversary. The ability of in-house or outside counsel to properly advise a client with an eye on litigation risks or strategies is materially compromised if the client thinks it likely that counsel's opinions ultimately will end up in the hands of opposing counsel in litigation.

2. The *Textron* rule will fundamentally alter the dynamics in civil litigation and will profoundly change the way companies seek, and lawyers provide, legal advice.

The First Circuit's approach also raises the stakes of an adverse, but erroneous, privilege ruling in all civil litigation. This Court recently held that an adverse ruling on a claim of attorney-client privilege is not immediately appealable under the collateral order doctrine. *Mohawk Indus., Inc. v.*

Carpenter, 130 S. Ct. 599, 603 (2009). The Court's reasoning makes it likely that litigants will not readily be able to take interlocutory appeals from adverse work product privilege rulings either.

However, a non-appealable ruling that an attorney's most sensitive mental impressions are freely discoverable by the adverse party will put hydraulic pressure on the client to settle rather than produce the documents and continue to litigate. Even legally and factually flimsy claims may produce windfalls if the plaintiff is able to force his opponent to produce its lawyers' written roadmap to the strengths and weaknesses of its case.

This combination of forces–a ruling (or even the threat of a ruling) that a lawyer's most sensitive opinion work product must be disclosed to the adverse party, coupled with the lack of immediate appellate review–fundamentally and unfairly changes the dynamics and the balance of power in all civil litigation.

In the wake of *Textron*, companies and their lawyers will have to change the way they seek and provide legal advice, to the detriment of the companies, their shareholders, and the robust attorney-client relationship that *Hickman v. Taylor*, 329 U.S. 495 (1947), recognized as being so important. As this Court rightly perceived in *Hickman*, if written materials that were prepared

"with an eye toward litigation" were "open to opposing counsel on mere demand":

> much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman, 329 U.S. at 511.

Indeed, the end result of the First Circuit's truncation of the language of Rule 26(b)(3) is the very result this Court sought to prevent in *Hickman*: an opposing party getting a free ride off his adversary's legal analysis and opinions. The palpable threat that counsel's research and thinking will be discoverable in future litigation will lead to a race to the bottom as regards the quality and depth of lawyers' written analyses of their clients' litigation risks.

Because Congress codified *Hickman* in Fed. R. Civ. P. 26(b)(3), it, and not the courts, should decide whether such a paradigm shift is warranted. *Cf. Mohawk Industries*, 130 S. Ct. at 609; *id.* at 609-10 (Thomas, J., concurring).

B. The Court should hear the case in order to restore needed uniformity and certainty for companies that count on the right to obtain privileged written assessments of litigation risks from their lawyers.

The Court should hear the case in order to provide much-needed uniformity and restore certainty in the Circuits' approaches to the application of the work product doctrine. There is no principled reason why a company headquartered in (or sued in) Rhode Island should receive fundamentally different treatment in discovery than a company headquartered in (or sued in) New York. To the contrary, by enacting Federal Rule of Evidence 501 in 1974, Congress sought to create a *uniform* federal common law of privilege in cases involving federal claims.[5] *See* Fed. R. Evid. 501

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[5] Fed. R. Evid. 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision

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(Notes to 1974 Enactment). Especially in view of the First Circuit's extremely narrow reading of Rule 26(b)(3), however, federal law is far from uniform.

This wide range of approaches to the application of Rule 26(b)(3) is especially problematic given the prevalence of multi-district litigation under 28 U.S.C. § 1407. If a suit is filed in the Second Circuit, but transferred by the Judicial Panel on Multi-District Litigation to a district court in the First Circuit, does the *Textron* rule–the law of the transferee circuit–apply (even though none of the parties has any connection with that jurisdiction and despite the parties' reasonable expectations)? Intractable problems also arise if the transferee court applies the privilege rules of the transferor courts. Because the Circuits have markedly different approaches to the breadth of the work product privilege, applying the rules of the transferor courts will result in fundamentally different rulings in the consolidated cases, even though the cases presumably involve many of the same parties, claims, and issues. These and like problems highlight the need for a uniform rule and the mischief that is created where (as here) the rules vary widely.

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thereof shall be determined in accordance with State law.

The conflict among the Circuits that the First Circuit has deepened also is likely to encourage strategic behavior in civil litigation over access to an opponent's legal roadmaps. This, in turn, is likely to increase collateral disputes, thereby increasing the cost and burden of litigation on the litigants and on the judicial system. In light of the well-documented differences among the Circuits regarding the discoverability of a lawyer's most sensitive mental impressions, one can expect to see more disputes over venue selection, choice of law, and choice of forum, as litigators seek the forum in which they are best able to take "a free ride on the research and thinking of [their] opponent's lawyer[.]" *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999).

Moreover, because federal privilege laws apply to pendent state law claims asserted in federal court, *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987); *Wm. T. Thompson Co. v. Gen. Nutrition Corp., Inc.*, 671 F.2d 100, 104 (3d Cir. 1982); *Hancock v. Hobbs*, 967 F.2d 462, 466-67 (11th Cir. 1992), a federal rule (like the rule in *Textron*) that permits extraordinarily broad discovery of opposing counsel's most sensitive mental impressions will be a strategic factor leading lawyers to find a way to sue in federal court. This, too, is likely to generate a raft of collateral litigation, as the courts attempt to winnow out dubious federal claims that were asserted primarily in an effort to obtain the benefit of favorable federal privilege law.

The pronouncement of a single, workable standard will provide help to litigators and their clients, and achieve the nationwide uniformity Federal Rule of Evidence 501 contemplates. The "because of the prospect of litigation" test used in the Second and Sixth Circuits (*United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998); *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006)) is workable, consistent with *Hickman*, and faithful to the language of Rule 26(b)(3). Accordingly, we join the Petitioner in asking this Court to grant the petition and reverse the First Circuit's *en banc* decision.

CONCLUSION

For the reasons noted, amici respectfully maintain that the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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